Supreme Court, U.S.
FILED
081317 APR 17 2009
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GILBERT EMAN,

Petitioner

v.

ERICH H. HOLDER Jr.,
United States Attorney General,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR
THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Arnedo S. Valera
Law Offices of Valera & Associates
3930 Walnut St., Ste. 200
Fairfax, VA 22030
Tel. No. (703) 273-1196
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that it lacked jurisdiction to review the Board of Immigration Appeals' (BIA) determination that the petitioner failed to establish "changed circumstances" to excuse the untimely filing of his asylum application.

2. Whether or not the Court of Appeals erred in not granting petitioner's application for asylum when the latter has met the standard of well founded fear of persecution.

CORPORATE DISCLOSURE STATEMENT

None of the parties are corporations. Sup. Ct. R. 29.6.

TABLE OF CONTENTS

Question Presented i

Corporate Disclosure ii

Table of Contents iii

Table of Authorities iv

Petition for Writ of Certiorari 1

Decision Below 1

Jurisdiction 1

Statutes and Regulations Involved 2

Statement of the Case 2

Reasons for Granting the Writ 6

1. The writ should be granted in order to correct the erroneous ruling of the 4th Circuit that the US Court of Appeals is without jurisdiction to review the BIA's determination that the asylum applicant has failed to show changed circumstances to excuse the untimely filing of an application for asylum which ruling directly conflicts with the decision of the 9th Circuit in Ramadan v. Gonzales, 479 F.3d 646, (9th Cir. 2007) that the Court of Appeals has jurisdiction to review the same where mixed questions of fact and law is involved. The conflicting decisions warrant the review of this Court 6

2. The failure of the BIA to grant the asylum application of petitioner despite the latter having satisfied the standard of well founded fear of persecution calls for the exercise of this Court's supervisory power 9

Conclusion 12

Appendix 1a

TABLE OF AUTHORITIES

Cases

Almuhtaseb v. Gonzales, 453 F.3d 743
(6th Cir 2006). 8

Hoxha v. Ashcroft, 319 F.3d 1179
(9th Cir. 2003). 11

Knezevic v. Ashcroft, 367 F.3d 1206
(9th Cir. 2004). 11

Matter of Mogharrabi, 19 I&N Dec. 439
(BIA 1987). 11

Ramadan v. Gonzales, 479 F.3d 646,
(9th Cir. 2007). 8, 9

Sael v. Ashcroft, 386 F.3d 922
(9th Cir. 2004). 9,10

Statutes

INA § 208 (a)(2)(B) 6

INA § 208 (a)(2)(D) 6

INA § 208 (a)(3) 7

28 USC § 1254(1) 1

Other Authorities

8 CFR § 208.4(a)(4) 7

8 CFR § 203.13(b)(2)(iii) 11

PETITION FOR A WRIT OF CERTIORARI

Gilbert Eman ("petitioner") prays that this Court reviews on certiorari the judgment of the United States Court of Appeals, for the Fourth Circuit, (the "US Court of Appeals") which dismissed petitioner's Petition for Rehearing and also dismissed in part and denied in part the appeal of the petitioner from the judgment of the Board of Immigration Appeals ("BIA") which affirmed the decision of the Immigration Court (IC).

DECISION BELOW

The unpublished per curiam opinion of the United States Court of Appeals dismissing the Petition for Review is set forth in the Appendix at 1a to 2a, and its Order denying the Petition for Rehearing at Appendix 3a.

JURISDICTION

The judgment of the United States Court of Appeals dismissing the Petition for Review of petitioner was entered on August 12, 2008; and its Order denying the Petition for Rehearing was entered on January 20, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Pursuant to this Court's Rule 14.1(f), the pertinent provisions of the following laws and regulations are set forth at Appendix 4a to 7a:

1. Section 208(a) of the Immigration and Nationality Act (INA) [8 USC§1158(a)];

2. INA § 242(a)(2)(D) [8 U.S.C. 1252(a)(2)(D)];

3. Title 8 Section 208.4(a)(4)of the Code of Federal Regulations (CFR); and

4. 8 CFR § 208.13(b)(2)(iii).

STATEMENT OF THE CASE

Petitioner is a citizen and national of Indonesia. He was born a Christian and continues to identify himself as a Christian. He is actively involved in his Christian church.

In Indonesia, petitioner was a member of an inter-denominational Christian ministry called Ecclesia. When he came to the United States to study in 1992, he joined the ICFC, an Indonesian Christian Church in Washington, D.C. In 2001, he moved to the Indonesian Pentecostal Church (GPdI) – "El Shaddai" – with which he was already familiar in Indonesia. El Shaddai has a church at 2504 Enalls Ave., Wheaton, MD20902 with Pastor Charles Tulenan as the senior pastor.

Petitioner's parents and sister are also Christians back in Indonesia. They attend church regularly despite the scarcity of Christian churches there due to the license requirements, the length of time the government processes these, and the Moslems extremists who have closed churches down.

Petitioner was persecuted in Indonesia because of his being a Christian. He narrated an attempted attack on him once when he was stopped on his way home and these people asked money from him. When they asked for his ID, he took off because he knew that something was going to happen to him once they see he is a Christian.

He testified about what happened to a friend who was mistreated and how Christians who are the minority do not get protection from the Government unlike the Moslem majority. He told of his Pastor Dominick who was stopped after church and then imprisoned; of his senior pastor Charles Tulenan and his followers whose church was burned and who were forced to evacuate Ternate, Maluku when Moslems attacked them.

Petitioner who had been studying in the U.S. on a valid F-1 visa since June 1992, was last admitted to the United States on or about December 10, 2000 on an F-1 visa to attend Strayer University in Washington, D.C. Between 1992 and 2000, he shuttled back and forth to Indonesia for a few times to visit his family. He noted (in his I-589 Asylum Application and personal statement) that tensions between Muslims and Christians in Indonesia began to escalate in 1997/1998 with the growth of Muslim extremists and random bombings of Christian churches in Indonesia.

Although he was attending school in the U.S., petitioner was constantly aware of the situation in Indonesia through family, friends and the media. Additionally, Pastor Charles Tulenan who was granted asylum in the U.S and became the Senior Pastor of the El Shaddai Church in Wheaton, MD where petitioner belonged, shared his story about how he, his family and close to 800 congregants were attached by Moslems and had to flee for their lives.

The situation grew progressively worse for Christians in Indonesia over the following years, climaxing in the period between October 2002 and August 2003 when Muslim extremists perpetrated the infamous Bali and Marriot Hotel bombings. Around 200 people were killed and 300 wounded

in the Bali bombing; and about 13 people were killed and 150 wounded in the Marriot Hotel bombing.

These bombings represented the "tipping point" for petitioner who felt after these bombings and in the wake of the 9/11 terrorist attacks on the Word Trade Center, that the circumstances in his country had so significantly changed that he could not return without being persecuted on account of his religious beliefs and active membership in the Indonesian Christian Church.

The 2005 US Department of State Country Report on Human Rights Practices in Indonesia (DOS 2005 Report) shows that Muslim extremists and terrorists continue to attack non-Muslim religious believers and restrict religious freedom. The Indonesian government is unable or unwilling to effectively punish the perpetrators and, in fact, limits freedom of religious expression and punishes religious expression of non-Muslims. According to the 2005 DOS Report: "On September 1, a court sentenced three women to three years in prison each for proselytizing based on their inclusion of Muslim children albeit with parental permission in Christian Sunday school activities" (pp. 14); and, "Courts sentenced several persons to jail for insulting Islam" (pp. 15).

On April 10, 2003, Petitioner reported to the US Immigration and Customs Enforcement (ICE) for SAR registration. Shortly thereafter, he received a Notice To Appear (NTA) before the Immigration Judge (IJ) in Baltimore, MD.

On October 29, 2003, petitioner filed his first I-589 application with the Immigration Court (IC). IJ Barrett terminating proceedings on February 17, 2004.

A new NTA was issued against petitioner on May 4, 2004 and IJ Dornell accepted petitioner's previously submitted I-589 application where petitioner sought the relief of Asylum, Withholding of Removal, and protection under the Convention Against Torture (CAT), or, in the alternative, voluntary departure.

In its Decision dated April 4, 2006, the IJ denied all the applications except voluntary departure.

Petitioner timely appealed the IC decision to the Board of Immigration Appeals (BIA) which, in its Order of November 6, 2007, affirmed the IJ decision and gave petitioner 60 days to voluntarily depart from the United States.

Petitioner filed on December 3, 2007, a Petition for Review with the US Court of Appeals 4th Circuit from the BIA's November 6, 2007 decision and filed a motion to stay pending appeal, his removal and the period of voluntary departure granted to him by the BIA. The motion was granted by the US Court of Appeals in its Order dated January 16, 2008. However, the Petition for Review was subsequently dismissed in part and denied in part in the Court's August 12, 2008 Judgment.

On September 25, 2008, petitioner filed a Petition for Rehearing which the US Court of Appeals also denied on January 20, 2009. Hence, this petition.

REASONS FOR GRANTING THE WRIT

1. The writ should be granted in order to correct the erroneous ruling of the 4th Circuit that the US Court of Appeals is without jurisdiction to review the BIA's determination that the petitioner's asylum application was untimely filed which ruling directly conflicts with the decision of the 9th Circuit in Ramadan v. Gonzales, 479 F.3d 646, (9th Cir. 2007) that the Court of Appeals has jurisdiction to review the same where mixed questions of fact and law is involved. The conflicting decisions warrant the review of this Court.--

Petitioner was admitted to the U.S on an F-1 student on or about December 10, 2000 as a student of Strayer University. He filed his I-589 Asylum Application on October 29, 2003.

Though filed more than a year from his 2000 entry, petitioner's case comes within the "changed circumstances" exception to the one-year filing requirement because he established the existence of changed circumstances in his home country.

INA § 208 (a)(2)(B) provides that an asylum application must be filed within 1 year after the date of the alien's arrival in the United States. INA §208 (a)(2)(D) carves out an exception: if the alien demonstrates either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application.

"Changed circumstances" is defined in 8 CFR §208.4(a)(4) as including changes in conditions in the applicant's country of nationality.

Petitioner cited the progressive escalation in violence directed against Christians living in all parts of Indonesia as the changes in the conditions of his country that justify his filing after more than one year from arrival. He points to the October 12, 2002, Bali bombing which killed about 200 people and left 300 wounded; the Marriot Hotel Bombing in Jakarta on August 5, 2003, which killed about 13 people and wounded about 150; and documentary evidence in the form of the DOS Reports, news articles and his own testimony on the escalating discrimination, threats, and attacks against Christians.

The IJ however in its Decision of April 4, 2006, held that the foregoing do not fall under the "changed circumstances" exception and hence the asylum application which was filed outside the 1 year prescriptive period, was filed out of time.

On appeal, the BIA affirmed the Decision of the IJ holding that petitioner's asylum application was time barred and that he failed to meet his burden of proving that he qualified for an exception to the filing deadline.

On Petition for Review to the US Court of Appeals for the 4th Circuit, the Court held that it lacked jurisdiction to review the said determination pursuant to 8 USC § 11568(a)(3) [INA§208(a)(3)] which provides that "no court shall have jurisdiction to review any determination of the

Attorney General under paragraph (2)" citing *Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006).

In *Almuhtaseb v. Gonzales*, the 6th Circuit of the US Court of Appeals held that the court will review asylum applications denied for untimeliness only when the appeal seeks review of "constitutional claims or matters of statutory construction," not when the question is "discretionary" or "factual." In resolving the issue before it, the 6th Circuit relied on the statutory provisions of INA § 242(a)(2)(D) as amended by the REAL ID Act § 106(a)(1)(A)(iii) that "[n]othing . . . in any. . . provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of *constitutional claims* or *questions of law* raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." (emphasis supplied).

However, resolving a similar issue and construing the same provision of law, the 9th Circuit, has held that an alien's fact-specific challenge to the BIA's determination that he has not established "changed circumstances" or "extraordinary circumstances" does raise a "question[] of law". The term "questions of law" in INA § 242(a)(2)(D) [8 U.S.C. 1252(a)(2)(D)] "extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Ramadan v. Gonzales*, 479 F.3d 646, (9th Cir. 2007). The Court of Appeals thus has jurisdiction to review the determination of the IJ or BIA on the timeliness of an asylum application where it would involve mixed questions of fact and law.

The issue of whether petitioner applicant has failed to show changed circumstances to excuse the untimely filing of an application for asylum is a mixed question of fact and law and falls squarely under the *Ramadan v. Gonzales* ruling of the 9th Circuit. It is thus error for the Court to have held that it had no jurisdiction to inquire into the determination made by the BIA.

The disagreement between the various circuits on this very important federal question warrants this Court's review so that it may finally be laid to rest with the adoption of the holding and reasoning of the Court of Appeals in *Ramadan v. Gonzales.*

2. The failure of the BIA to grant the asylum application of petitioner despite the latter having satisfied the standard of well founded fear of persecution calls for the exercise of this Court's supervisory power.

To be well founded, an asylum applicant's fear of persecution must be both subjectively genuine and objectively reasonable.

An applicant satisfies the subjective component by credibly testifying that he genuinely fears persecution. *Sael v. Ashcroft,* 386 F.3d 922 (9th Cir. 2004). Petitioner satisfied this with his credible and detailed testimony that he fears being hurt, killed and/or assaulted in Indonesia.

An asylum applicant generally satisfies the objective component in one of two ways: either by establishing that he

has suffered persecution in the past or by showing that he has a good reason to fear future persecution. *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004).

Petitioner has asserted that he is a Christian in a predominantly Muslim country. He openly lives and actively practices his religion which makes him a target of the Muslim extremists from whom he fears persecution.

Petitioner has shown that Muslim extremists in Indonesia seek to repress, punish, persecute and eradicate non-Muslims, especially Christians, through a pattern of intimidation, harassment and violence. Indonesian authorities condone such behavior because they cannot control the extremists. Not only that, Indonesian law discriminates against Christians.

Petitioner has testified that he and his family fear going to church because people throw rocks at the church during service; and even their church was bombed on Christmas eve of 2000 while the service was going on. He expressed fear of persecution because Christians in Indonesia like him and his family were and still are mistreated. He cited what happened to a friend who was mistreated.

Petitioner testified and presented documents showing the escalating violence being perpetrated by Muslim extremists against Christians. He testified on the Bali and Marrriott bombings in Indonesia and the simultaneous attack in three different cities in Indonesia on Christmas eve of 2000 during the church service. One of the churches that was bombed was the church where his parents were attending. He named his pastor who was persecuted in Indonesia. This pastor was stopped after church and he was put to jail. All these incidents

were reported to the police but they remained unsolved and nothing happened.

A well founded fear does not require certainty of persecution or even a probability of persecution. *Hoxha v. Ashcroft*, 319 F.3d 1179 (9th Cir. 2003). Even a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear. *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004). An applicant for asylum has established a well founded fear if he shows that a reasonable person in his circumstances would fear persecution. Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims. A well-founded fear, in other words, can be based on what has happened to others who are similarly situated. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

8 CFR §208.13(b)(2)(iii) also provides that the asylum applicant need not provide evidence that there is a reasonable possibility he would be singled out individually for persecution if: (A) he establishes that there is a pattern or practice in his country of nationality of persecution of a group of persons similarly situated to him on account of his religion; and (B) he establishes his own inclusion in, and identification with, such group of persons such that his fear of persecution upon return is reasonable.

That there is a pattern or practice of persecution of Christians in Indonesia has been established through petitioner's testimony, the DOS Reports and news articles submitted in evidence.

Petitioner has thus satisfied the standard of well founded fear of persecution on account of his religion.

Under these circumstances, and in accordance with the United Nations Convention and Protocol relating to the Status of Refugees to afford a generous standard for protection in cases of doubt, petitioner should be granted the relief of asylum.

CONCLUSION

WHEREFORE, it is respectfully prayed of the Honorable Court to grant the petition for a writ of certiorari.

Respectfully Submitted:

"S/"
ARNEDO S. VALERA
LAW OFFICES OF VALERA & ASSOCIATES,
3930 Walnut St., Ste. 200
Fairfax, VA 22030
(703) 273-1196
Counsel for Petitioner

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GILBERT EMAN,
Petitioner,

v.

ERICH H. HOLDER Jr.,
United States Attorney General,
Respondent.

No. 07-2183

On Petition for Review of an Order of the
Board of Immigration Appeals
(A72-167-563)

Submitted: July 22, 2008

Decided: August 12, 2008

Before NIEMER, MOTZ, and TRAXLER,
Circuit Judges.

PER CURIAM:

Gilbert Eman, a native and citizen of Indonesia, seeks review of an order of the Board of Immigration appeals (Board) affirming the decision of the Immigration Judge denying relief from removal. In his petition for review, Eman first argues that the Board erred in finding that his asylum application was not timely filed and that no exceptions applied to excuse the untimeliness. We lack jurisdiction to review this determination pursuant to 8 U.S.C. § 1158(A)(3)(2006), even in light of the passage of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 stat. 231. See Almuhtaseb vs. Gonzales, 453 F.3d 743, 747-48 (6th Cir. 2006) (collecting cases).

Eman next challenges the Board's alternative finding that he failed to establish eligibility for asylum. To obtain reversal of a determination denying eligibility for relief, an alien "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." INS V. Elias-Zacarias, 502 U.S. 478, 483-84 (1992). We have reviewed the record and conclude that Eman fails to show that the evidence compels a contrary result. Because Eman has not established eligibility for asylum, he cannot meet the more demanding standard for the relief of withholding of removal. See Chen v. INS, 195 F.3D 198, 205 (4th Cir. 1999).

Accordingly, we dismiss in part and deny in part the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DISMISSED IN PART
AND DENIED IN PART

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
JANUARY 20, 2009

No. 07-2183
A72-167-563

GILBERT EMAN,
Petitioner,

v.

MICHAEL B. MUKASEY
Attorney General of the United States,
Respondent,

ORDER

The Court denies the petition for rehearing.
Entered at the direction of the panel: Judge Niemeyer, Judge Motz, and Judge Traxler.

For the Court,

/s/ Patricia S. Connor

CLERK

STATUTORY PROVISIONS INVOLVED

Section 208(a) of the Immigration and Nationality Act (INA); [8 USC§1158(a)]

(a) Authority to Apply for Asylum.—

(1) *In general.*— Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port or arrival and including an alien who is brought to the United States after having been interdicted in international or United states waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2) Exceptions.—

(A) Safe third country.—Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien' life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney general finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit.—Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications. – Subject to subparagraph (D), paragraph (1) shall not apply to an alien if

the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances. – An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(3) Limitation on judicial review.—No court shall have jurisdiction to review any determination of the Attorney general under paragraph (2).

Section 242(a)(2)(D) of the Immigration and Nationality Act (INA) [8 U.S.C. 1252(a)(2)(D)]

(D) *Judicial Review of Certain Legal Claims.*—Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

PROVISIONS OF THE CODE OF FEDERAL REGULATIONS INVOLVED

8 CFR § 208.4(a)(4)

(4) Changed circumstances.

The term "changed circumstances" in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death or attainment of age 21.

(ii) the applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

8 CFR § 208.13(b)(2)(iii)

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A)The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

Supreme Court, U.S.
FILED
081317 APR 17 2009
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

GILBERT EMAN,
Petitioner

v.

ERICH H. HOLDER Jr.,
United States Attorney General,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR
THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Arnedo S. Valera
Law Offices of Valera & Associates
3930 Walnut St., Ste. 200
Fairfax, VA 22030
Tel. No. (703) 273-1196
Counsel for Petitioner

TABLE OF CONTENTS

Table of Contents 8a
Decision of Board of Immigration Appeals 9a
Decision of Immigration Judge 12a

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Date: November 6, 2007

File: A72 167 563 – Baltimore, MD

In re: GILBERT, EMAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Arnedo S. Valera, Esquire

ORDER:

PER CURIAM. The respondent, who is an Indonesian Christian, has appealed from the Immigration Judge's decision dated April 4, 2006. This Board must defer to an Immigration Judge's factual findings in the absence of clear error. 8 C.F.R. § 1003.1(d)(3)(i). The appeal is dismissed. The respondent's request for oral argument before the Board is denied.

We find that the respondent's arguments through counsel lack support in the record or are otherwise meritless. Many of his arguments are similar to those that we considered and rejected in our precedent decision in *Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005). We agree with the Immigration Judge that the respondent's asylum application is time-barred. The

application was untimely filed, and the respondent did not meet his burden of showing he qualified for an exception to the filing deadline 8 C.F. R. § 1208.4. Even if not time bar existed, we agree with the Immigration Judge's alternate determination that the respondent did not meet his burden of proof for asylum. See, e.g., Tr. at 19-32, 58-83, 87-89; Exhs. 3, 5, 7. He did not establish past persecution or a well-founded fear of persecution on account of a ground protected under the asylum law. We further agree with her conclusion that the respondent failed to meet the more demanding burden of proof for withholding of removal. His experiences in his native lad did not rise to the level of past persecution on account of a statutorily protected ground, and he failed to establish that it was more likely than not that he would suffer such persecution on account of a protected ground. *Matter of A-M-, supra.*

The respondent waived protection under the Convention Against Torture (CAT) as an appellate issue by failing to make any meaningful appellate arguments regarding it. *Waani v. Gonzales*, Slip Copy, 2007 WL 2349280 (rth Cir. Aug.; 17, 2007). Even assuming arguendo that this issue was not waived, the respondent did not show it was more likely than not that he would suffer torture in his native land. He did not meet his separate burden of proof for CAT protection. *Matter of A-M-*, supra, at 742.

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS, formerly the Immigration and Naturalization

Service.). See section 240 (Bb) of the Immigration and Nationality Act; 8C.F.R. §§ 1240.26(c), (f). In the even the respondent fails to so depart, the respondent shall be removed to Indonesia.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5m000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240 A, 245, 248 and 249 of the Immigration and Nationality Act. See section 240B(d) of the act.

"s/" Roger Pauley
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Baltimore, Maryland

File No.: A 72 167 563 April 4, 2006

In the Matter of	)	
	)	IN REMOVAL
GILBERT EMAN	)	PROCEEDINGS
Respondent	)	

CHARGE: 2 237(A)(1)(C)(i).

APPLICATIONS: Asylum.
Withholding of removal under INA Section 241(b)(3).
Relief from removal under the Convention against Torture.
Voluntary departure.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Cheryl Renerick	Nelson Vargas

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Indonesia, who was born in 1976. He last entered the United States on December 10, 2000.

He was issued Notices to Appear on April 10, 2003 and, now applicable in this case, on May 4, 2004. At a Master Calendar hearing, the respondent was found removable based on his pleading to the charges in the Notice to Appear.

The respondent has requested asylum, withholding of removal under INA Section 241(b)(3), relief from removal under the Convention against Torture, and voluntary departure. The respondent filed those applications for relief with the Court on October 29, 2003. In the event the respondent is removed, the country designated for removal is Indonesia. The Court has found that the respondent is removable by clear and convincing evidence. See INA Section 240(c)(1)(A). The issue before the Court is whether he is eligible for relief from removal.

Statement of the Case

The Court considered the following documentary evidence which was entered into the record: Exhibit No. 1, the Notice to Appear issued on April 10, 2003; Exhibit No. 1-A, the Notice to Appear issued on May 4, 2004; Group Exhibit No. 2, the Department of Homeland Security's evidentiary submission of July 2, 2003 (tabbed A through C); Group Exhibit No. 3, the asylum application and attachments 1 through 5; Group Exhibit No. 4, the 2002 Department of State country condition report; Exhibit No. 5, the 2005 Department of State country condition report on Indonesia; Exhibit No. 6, the respondent's brief; and Exhibit No. 7, the Department of Homeland Security's submission of the most recent International Religious Freedom Report from the State Department for Indonesia.

The respondent was the only witness to testify. Mr. Eman testified that he is from Jakarta, Indonesia and that he entered the United States, as a student in 1992. He explained that he was on a F1 student visa. He also explained that the last time he entered the United States was in December 2000. He explained that he is seeking asylum because he fears persecution as a Christian in Indonesia. He explained that he himself is a "reborn" Christian and that he became such a Christian in 2002. He explained that he was also baptized as a

Christian as a child. He explained that he goes to church regularly in the United States, which he also did in Indonesia.

Mr. Eman's parents and his sister live in Jakarta. They too are Christians and attend services regularly. He explained that his parents have been afraid in Indonesia and, for example, that people have throw rocks at their church. He also explained that he believes his life would be in danger in Indonesia and that he feels better in the United States. He indicated that while the laws may protect various religious groups in Indonesia, he has noticed that Moslems receive preferential treatment. For example, he noted that one of the individuals responsible for the Bali bombing in 2002, Amubaka Bashir, received what the respondent felt was a light sentence.

Mr. Eman also noted three incidents that made him afraid to return to Indonesia. One was the October 2002 bombing in Bali, the second was a bombing on Christmas eve is 2002 in Jakarta during which three churches were bombed. One of those was a church that the respondent attended. The third incident that Mr. Eman mentioned was the August 2003 bombing of the Marriott hotel in Indonesia.

The respondent also described a number of incidents that made him concerned in general. He indicated that he knows a pastor, Pastor Dominick who was stopped after church and was jailed after being accused of having a weapon. He noted that he has a friend who was attacked coming home from a church. He also stated that he is aware that extremist Moslems are persecuting Christians in pars of the country. He indicated that he understands that the police will sometimes say they will look for suspects and that they may not do that much.

The respondent also answered a number of questions concerning the timing of his asylum application and why he

only filed for asylum in October of 2003. He explained that he appeared for special registration with Immigration officials in the United States that was required for Indonesians following the attacks of September 11, 2001. he explained that that ended up getting him in proceedings and that while in Court proceedings, he learned that he could apply for asylum. He also indicated that he was attempting to pursue avenues of remaining in the United States legally and, for example, was looking for a work visa. The effort to look for a work visa to date has not been successful. He also indicated that he would be afraid throughout Indonesia and that he did not believe that he could live safely anywhere in Indonesia besides Jakarta and that he was afraid in Jakarta as well. He explained that Moslem extremist groups exist throughout Indonesia.

He also answered some questions posed by his own attorney and government counsel concerning his arrest which is also documented in the record. That arrest concerned shoplifting of merchandise from Cosco. The respondent explained that it was his friend who was actually stealing the merchandise. When asked on cross-examination about a probation violation for not completing his last appointment for community service and for not paying a restitution payment, the respondent readily acknowledged that he had not completed all of the terms of his probation. He stated that he had no other arrest in the United States.

Applicable Law

A. One Year bar on Asylum

INA Section 208 and 8 C.F.R. Section 1208.;4(a)(2) set a one year deadline on the filing of an asylum application. Under INA Section 208(a)(2)(B) and C.F.R. 1208.4(a)(2), an applicant has the burden of proving by "clear and convincing evidence" that an application has been filed within one year

of the date of the alien's arrival in the U.S. Exceptions to the deadline apply where "the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application." INA Section 208(a)(2)(B) and (D). Even where an exception to the one year time limit applies, the applicant is to file an asylum application "within a reasonable period given those changed circumstances." 8C.F.R. Section 1208.4 (a)(4)(ii).

B. Substantive Standards for Asylum

To establish eligibility for asylum under Section 208 of the Immigration and nationality Act, an applicant must show that he or she is unable or unwilling to return to his or her country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or a political opinion. See INA Section 101(a)(42)(A); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997).

The applicant bears the burden of proof and the Court must make a threshold determination of credibility. See Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998). Persecution is not defined in the statute or regulations. The BIA has interpreted persecution to include serious threats to an individual's life or freedom or the infliction of significant harm. Persecution does not encompass discrimination, social unrest, or other conditions that may be unjust or unfair. See for example Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); Lee v. Gonzales, 405 F. 3d 171 (4th Cir. 2005).

An applicant for asylum need not prove that he or she would be singled out individually if the applicant establishes that there is a "pattern or practice" of persecution of "similarly situated" persons in the country and the applicant establishes

his or her inclusion in and identification with that group. 8 C.F.R. Section 1208.13(b)(2)(iii).

C. Withholding of Removal under INA Section 241(b)(3)

To establish eligibility for withholding of removal under INA Section 241(b)(3), an individual must demonstrate a "clear probability" of persecution on account of one of the five statutorily protected grounds. See INS V. Stevic, 467 U.S. 401 (1984).

D. Relief from Removal under the Convention against Torture

To be extended protection under Article 3 of the Convention against Torture, the respondent must establish that it is "more likely than not that he or she would be tortured if removed to the proposed country of removal." 8C.F.R. Sections 1208.16 and 1208.17. Under Camara v. Ashcroft, 379 F.3d 361(4th Cir. 2004), in assessing a claim under the CAT, an Immigration Court must consider "all evidence relevant to the possibility of future" and cannot rely solely on an adverse credibility determination to deny relief.

E. Voluntary Departure

INA Section 240B(b) sets out the statutory requirements for eligibility for voluntary departure at the close of proceedings.

Analysis and Findings

A. Credibility

The Court has examined all of the documents in the record and the testimony presented by the respondent and has found the respondent to be credible. He has presented a plausible account of his fears and those are consistent with his

prior statements and they are also consistent with the general country conditions reports. The Court found Mr. Eman to be candid and responsive in answering questions posed.

B. One Year Bar

However, the Court finds that the respondent's application for asylum is barred by the one year time limit. The respondent clearly did not file within the one year time limit. The respondent argues that changed circumstances materially affecting his asylum application should justify the late filing. Notably, he points out the church bombings in December 2000, the 2002 bombings in Bali, and the August 2003 Marriott bombing. The Court notes first that the Court has concluded that those incidents do not materially affect his asylum application.

This case is very much like the case considered by the Board in Matter of A-M-, 23 I&N Dec. 737 (BIA 2005). In particular, the Court is concerned that those particular events do not establish that the respondent would in fact would have a well-founded fear of future persecution on the basis of his religious. Moreover, the Court also concludes that he did not file his asylum application within a reasonable time after he became aware of those incidents. Certainly, the December 2002 and the Bali bombing in 2002 were complete over a year in advance of him filing his asylum application.

C. Asylum Claim

Even if the Court found that the respondent's application would be allowed despite missing the one year deadline, the Court would conclude that he has not satisfied his burden of proof and demonstrated that he has a well-founded fear of future persecution on the basis of his religion. In particular, he raises a pattern and practice that was also discussed by the Board in Matter of A-M-, 23 I&N, Dec. 737 (BIA 2004). The

court finds that there is simply not enough evidence in his testimony or the record to demonstrate that there is in fact a pattern and practice of persecuting Christians in Indonesia. Rather, the Court finds that there is a certain level of civil unrest and sectarian conflict.

D. Withholding of Removal under INA Section 241(b)(3)

The court finds that the respondent has not met the burden required for withholding of removal under 241(b)(3), in that he has demonstrated that there is a clear probability that he will be persecuted on account of his religion either on the basis of him individually being targeted or on the basis of the existence of a pattern and practice of persecution in Indonesia.

E. Relief from Removal under the Convention against Torture

The Court has also independently reviewed the record to examine the possibility of torture and the Court concludes that there is not a sufficient showing in the record that it would be more likely than not that the respondent would be tortured if removed to Indonesia. Certainly, the evidence in the record, particularly the Department of State International Religious Freedom Report for 2000 notes that there is a certain of sectarian violence and differences. That report, however, also notes that the Indonesian government is taking some efforts to pursue those involved and the report notes that there seemed to have recently been some advances in improving Christian and Moslem relations.

F. Voluntary Departure

The parties and the Court agree that the respondent merits a grant of voluntary departure pursuant to INA Section 240B(b).

ORDER

IT IS HEREBY ORDERED that the respondent's applications for asylum, withholding of removal under INA Section 241(b)(3), and relief under the Convention against Torture are hereby denied.

IT IS FURTHER ORDERED that the respondent is to be granted voluntary departure. He is to depart voluntarily by June 5, 2006, the maximum statutory allowable period and the Court is setting a voluntary departure bond in the amount of $500.

"s/" _____
ELIZABETH A. KESSLER
Immigration Judge

Supreme Court, U.S.
FILED
JUN 26 2009
OFFICE OF THE CLERK

No. 08-1317

In the Supreme Court of the United States

GILBERT EMAN, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that petitioner failed to establish "changed circumstances" to excuse the untimely filing of his asylum application.

2. Whether the court of appeals erred in holding that substantial evidence supported the agency's determination that petitioner failed to establish eligibility for asylum.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 15

TABLE OF AUTHORITIES

Cases:

A-M -, In re, 23 I. & N. Dec. 737 (B.I.A. 2005) 6, 13, 15
Almuhtaseb v. *Gonzales*, 453 F.3d 743 (6th Cir. 2006) 9
Chacon-Botero v. *United States Att'y Gen.*, 427 F.3d 954 (11th Cir. 2005) 9
Chen v. *United States Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006) 9
Ferry v. *Gonzales*, 457 F.3d 1117 (10th Cir. 2006) 9
Haig v. *Agee*, 453 U.S. 280 (1981) 12
Higuit v. *Gonzales*, 433 F.3d 417 (4th Cir.), cert. denied, 548 U.S. 906 (2006) 12
Ignatova v. *Gonzales*, 430 F.3d 1209 (8th Cir. 2005) 9
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 7, 13, 14
Lie v. *Ashcroft*, 396 F.3d 530 (3d Cir. 2005) 15
Niang v. *Gonzales*, 492 F.3d 505 (4th Cir. 2007) 10, 11
Ramadan v. *Gonzales*, 479 F.3d 646 (9th Cir. 2007) ... 9, 10
Sukwanputra v. *Gonzales*, 434 F.3d 627 (3d Cir. 2006) 9, 12
Usman v. *Holder*, 566 F.3d 262 (1st Cir. 2009) 9

Cases—Continued: Page

Viracacha v. *Mukasey*, 518 F.3d 511 (7th Cir.), cert. denied, 129 S. Ct. 451 (2008) 9
Webster v. *Doe*, 486 U.S. 592 (1988) 12
Zhu v. *Gonzales*, 493 F.3d 588 (5th Cir. 2007) 9

Treaty, statutes and regulations:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1084, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 4
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(42)(A) 2
8 U.S.C. 1158(a)(2)(B) 2
8 U.S.C. 1158(a)(2)(D) 2, 11, 12
8 U.S.C. 1158(a)(3) 3, 7, 10, 11, 12
8 U.S.C. 1158(b)(1) 2
8 U.S.C. 1158(b)(1)(A) 2
8 U.S.C. 1158(b)(1)(B)(i) 2
8 U.S.C. 1158(d)(1) 3
8 U.S.C. 1227(a)(1)(C)(i) 4
8 U.S.C. 1252(a)(2) 3
8 U.S.C. 1252(a)(2)(D) ..... *passim*
8 U.S.C. 1252(b)(4)(B) 7, 13, 14
REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 4
8 C.F.R.:
Section 1208.4(a)(2)(A) 2
Section 1208.4(a)(4)(i) 13

Regulations—Continued: Page

Section 1208.4(a)(4)(i)(A) 3
Section 1208.4(a)(4)(ii) 3
Section 1208.4(a)(5) 3
Section 1208.13(a) 2
Section 1240.8(d) 2

Miscellaneous:

H. R. Rep. No. 72, 109th Cong., 1st Sess. (2005) 12

In the Supreme Court of the United States

No. 08-1317

GILBERT EMAN, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 288 Fed. Appx. 125. The decisions of the Board of Immigration Appeals (Pet. Supp. App. 9a-11a) and the immigration judge (Pet. Supp. App. 12a-20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2008. A petition for rehearing was denied on January 20, 2009. The petition for a writ of certiorari was filed on April 17, 2009. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA) provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a refugee within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

b. An alien who wishes to be granted asylum must file his application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B). An alien who fails to meet that requirement "may be considered" for asylum if he demonstrates "to the satisfaction of the Attorney General" or the Secretary of Homeland Security either the existence of "changed circumstances" that materially affect his eligibility for asylum, or "extraordinary circumstances" that excuse his failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence," that his application for asylum was filed within one year of his entry into the United States. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2)(A).

The Attorney General, who is responsible for adjudicating asylum applications filed by aliens in removal proceedings, 8 U.S.C. 1158(d)(1), has defined the term "changed circumstances" by regulation to include, *inter alia*, "[c]hanges in conditions in the applicant's country of nationality." 8 C.F.R. 1208.4(a)(4)(i)(A). The Attorney General has defined "extraordinary circumstances" as personal circumstances "directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his or her own action or inaction," including, *inter alia*, "[s]erious illness or mental or physical disability," "[l]egal disability," and "[i]neffective assistance of counsel." 8 C.F.R. 1208.4(a)(5). In addition to showing "changed circumstances" or "extraordinary circumstances," the applicant must show that he filed his asylum application within a reasonable period of time given those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5).

c. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination regarding whether the changed or extraordinary circumstances exception applies. 8 U.S.C. 1158(a)(3). In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. a. Petitioner is a native and citizen of Indonesia. Pet. App. 2a. He was admitted to the United States on a student visa, but he failed to maintain the conditions of his student status. Pet. Supp. App. 12a; Administrative Record (A.R.) 623-624. United States Immigration and Customs Enforcement therefore charged him with being removable as an alien who, after being admitted as a nonimmigrant, failed to maintain the conditions of his nonimmigrant status. A.R. 623-624; see 8 U.S.C. 1227(a)(1)(C)(i).

Petitioner conceded that he is removable as charged, and an immigration judge (IJ) found that he is removable. Pet. Supp. App. 12a. Petitioner sought asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong. 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. Supp. App. 13a; A.R. 446-456.

The IJ held a hearing, at which petitioner was the sole witness. Pet. Supp. App. 13a; A.R. 131-183. Petitioner claimed that he feared persecution in Indonesia because he is a Christian. Pet. Supp. App. 13a. He recounted one occasion when he was in Indonesia in which strangers asked to see his identification and he ran away from them. A.R. 169-170. Petitioner acknowledged that, other than that one occasion, he had never had any problems in Indonesia based on his religion. A.R. 108-109. He also explained that his parents and sister, who are also Christian, remain in Indonesia, where they attend weekly religious services. A.R. 142-143. Petitioner ac-

knowledged that Indonesian law protects all people against religious discrimination, but he stated that he believes Muslims, who are in the majority, receive preferential treatment. Pet. Supp. App. 14a; A.R. 62.

Petitioner also testified about his delay in filing the asylum application. Although he was last admitted to the United States in December 2000, he did not file his asylum application until October 2003. Pet. Supp. App. 12a-13a. Petitioner stated that he waited to file his application until that time because he did not become aware that he could apply for asylum until after he was first placed in removal proceedings. *Id.* at 15a; A.R. 149. He also stated that the series of bombings from 2000 to 2003—church bombings on Christmas Eve 2000, the bombing of a Bali nightclub in October 2002, and the bombing of a Marriott hotel in Jakarta in August 2003—constituted changed circumstances that excused his untimely filing. Pet. Supp. App. 14a-15a, 18a; A.R. 150-151.[1]

b. The IJ denied petitioner's applications for asylum, withholding of removal, and CAT protection. Pet. Supp. App. 12a-20a. First, the IJ determined that petitioner's asylum application was not filed within one year of his entry into the United States and that he had failed to demonstrate material changed circumstances that excused the untimely filing. *Id.* at 18a. The IJ explained that petitioner "clearly did not file within the one year time limit," and that the bombings from 2000-2003 did not constitute "changed circumstances" that materially affected his asylum application. *Ibid.* The IJ explained that the Board of Immigration Appeals

---

[1] Petitioner did not argue that there are any extraordinary circumstances that excuse the untimely filing of his asylum application.

(Board) had rejected just such a changed circumstances argument in *In re A-M-*, 23 I. & N. Dec. 737 (B.I.A. 2005). Pet. Supp. App. 18a. The IJ also determined that, even if the bombings did constitute material changed circumstances in Indonesia, petitioner "did not file his asylum application within a reasonable time after he became aware of those incidents," because the bombings happened "over a year in advance of him filing his asylum application." *Ibid.*

The IJ then held, in the alternative, that petitioner failed to satisfy his burden of proving that he has a well-founded fear of future persecution on the basis of his religion. Pet. Supp. App. 18a-19a. The IJ found that petitioner was credible, *id.* at 17a, but also determined that "there is simply not enough evidence in [petitioner's] testimony or the record to demonstrate that there is in fact a pattern or practice of persecuting Christians in Indonesia," *id.* at 19a. Citing *In re A-M-*, the IJ observed that the existence of some "civil unrest and sectarian conflict" in Indonesia did not rise to the level of a systematic and pervasive pattern of persecution sufficient to demonstrate a well-founded fear of religious persecution. *Ibid.*

Finally, the IJ denied petitioner's claims for withholding of removal and CAT protection and granted him voluntary departure, stating that he was required to depart the United States by June 5, 2006. Pet. Supp. App. 19a-20a.[2]

3. The Board dismissed petitioner's appeal. Pet. App. 9a-11a. As relevant here, the Board "agree[d] with

---

[2] Petitioner did not appeal the denial of CAT protection. Pet. Supp. App. 10a. The Board and the court of appeals rejected petitioner's claim for withholding of removal, Pet. App. 1a-2a; Pet. Supp. App. 10a, and petitioner does not renew that claim before this Court.

the Immigration Judge that [petitioner's] asylum application is time-barred." *Id.* at 9a. The Board explained that the "application was untimely filed," and petitioner "did not meet his burden of showing he qualified for an exception to the filing deadline." *Id.* at 9a-10a. And the Board noted that petitioner's arguments "are similar to those that [the Board] considered and rejected" in *In re A-M-*. *Id.* at 9a. The Board also determined that petitioner's claim for asylum failed on the merits, because he had not met his burden of "establish[ing] past persecution or a well-founded fear of persecution on account of a [protected] ground." *Id.* at 10a. The Board then stated that petitioner was required to voluntarily depart the United States within 60 days. *Ibid.*[3]

4. The court of appeals dismissed in part and denied in part petitioner's petition for review in an unpublished, non-precedential opinion. Pet. App. 1a-2a. First, the court held that it lacked jurisdiction under 8 U.S.C. 1158(a)(3) and 1252(a)(2)(D) to review the Board's determination that no changed circumstances excused petitioner's late filing of his asylum application. *Id.* at 2a.

In the alternative, the court of appeals rejected petitioner's asylum claim on the merits. Pet. App. 2a. It noted that, to obtain reversal, petitioner "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Ibid.* (quoting *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483-484 (1992)); see 8 U.S.C. 1252(b)(4)(B) (administrative findings of fact conclusive

---

[3] Although petitioner sought and obtained a stay of removal pending consideration of his petition for review, he never sought a stay of his period of voluntary departure. To the best of the government's knowledge, petitioner did not depart within the time permitted and has remained in the United States illegally.

unless a reasonable adjudicator would be compelled to conclude to contrary). The court stated that it "reviewed the record and conclude[d] that [petitioner] fail[ed] to show that the evidence compels a contrary result." Pet. App. 2a.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the court of appeals erred in holding that it lacked jurisdiction to review the Board's conclusion that he failed to demonstrate material changed circumstances that would excuse the late filing of his asylum application. The question whether the courts of appeals retain jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the agency's decision that an asylum applicant failed to demonstrate "changed circumstances" or "extraordinary circumstances" to excuse the untimely filing of his application is a recurring issue that has led to some disagreement among the courts of appeals and may warrant this Court's review in an appropriate case. This is not an appropriate case, however, because the court of appeals' opinion is unpublished and thus did not create circuit precedent; because the court of appeals was correct in holding that it lacked jurisdiction to review petitioner's challenge to the denial of his request for asylum; and because resolution of the question regarding the scope of 8 U.S.C. 1252(a)(2)(D) likely would not change the outcome of petitioner's case.

a. The federal courts of appeals have disagreed about whether they have jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the Board's determination that an alien failed to adduce sufficient facts to demonstrate "extraordinary circumstances" or "changed circumstances" to justify the untimely filing of an asylum appli-

cation. The First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that such a claim normally does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Usman* v. *Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (extraordinary or changed circumstances); *Viracacha* v. *Mukasey*, 518 F.3d 511, 514-516 (7th Cir.) (changed or extraordinary circumstances), cert. denied, 129 S. Ct. 451 (2008); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 332 (2d Cir. 2006) (changed or extraordinary circumstances); *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (changed circumstances); *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances); *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (extraordinary circumstances). Those courts have explained that a challenge to the Board's determination that an alien did not establish "changed circumstances" or "extraordinary circumstances" "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," not an argument that raises a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). *Chen*, 471 F.3d at 332.

The Ninth Circuit, in contrast, has held that an alien's challenge to the Board's determination that he has not established "changed circumstances" or "extraordinary circumstances" did raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (2007) (changed circumstances).

In the Ninth Circuit's view, the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Ramadan*, 479 F.3d at 650.

b. That disagreement in the courts of appeals may warrant this Court's attention in an appropriate case. This is not an appropriate case, however, for four reasons.

First, the decision below is unpublished and does not create circuit precedent. See Pet. App. 1a. It therefore does not itself give rise or contribute to the type of disagreement in published opinions that warrants this Court's review. Moreover, the court did not address whether petitioner's claim raises a "question[] of law" in any detail. Rather than discuss the circumstances in which an issue involving a late-filed asylum application might raise a "question[] of law" allowing the exercise of jurisdiction, the court simply stated that it "lack[ed] jurisdiction to review this determination pursuant to 8 U.S.C. § 1158(a)(3) (2006), even in light of the passage of the REAL ID Act of 2005." Pet. App. 2a. To the best of the government's knowledge, the Fourth Circuit has not addressed the question presented here in any published decision.[4]

---

[4] In *Niang* v. *Gonzales*, 492 F.3d 505 (4th Cir. 2007), the court of appeals stated that it would lack jurisdiction to review a challenge to the agency's decision that an asylum application was untimely under 8 U.S.C. 1158(a)(3). *Id.* at 510 n.5. But that statement was dictum, because the court found that the alien had waived any such challenge. *Ibid.* Moreover, the court did not address the question whether a challenge to the Board's determination that an alien has not established "changed circumstances" or "extraordinary circumstances" would raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D); indeed, the court did

Second, the court of appeals correctly determined that it lacked jurisdiction over petitioner's fact-bound claim because it does not raise a "question[] of law." Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding an exception to the one-year filing deadline for asylum claims, including the determination that a particular asylum applicant has not "demonstrate[d] to the satisfaction of the Attorney General * * * the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing," 8 U.S.C. 1158(a)(2)(D). As petitioner acknowledges (Pet. 6-7), his petition for review challenged a determination that his asylum application was untimely and that he had failed to demonstrate changed circumstances to justify that untimely filing. Judicial review of petitioner's claim is therefore barred under 8 U.S.C. 1158(a)(3) unless the exception for "questions of law" in 8 U.S.C. 1252(a)(2)(D) applies.

The court of appeals correctly held that petitioner's challenge to the Board's fact-bound, discretionary determination did not raise a "question[] of law." In this case, the governing rules of law are undisputed; the Board rejected petitioner's changed circumstances argument because it found that petitioner failed to demonstrate, on the particular facts of his case, that there had been a change in conditions in Indonesia that was material to his asylum application. Pet. Supp. App. 9a-10a. That determination is not a legal determination, but a factual determination. If petitioner's fact-bound challenge to the Attorney General's discretionary determination

---

not mention 8 U.S.C. 1252(a)(2)(D) at all. *Ibid.* And the decision below did not rely on *Niang*. Pet. App. 2a.

raised a "question[] of law," then any error any agency could make might be a question of law, thereby rendering the jurisdictional bar in 8 U.S.C. 1158(a)(3) meaningless. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) (courts "are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive"), cert. denied, 548 U.S. 906 (2006).

Moreover, the question whether petitioner demonstrated "changed circumstances" to justify an untimely filing is a question committed to the Attorney General's discretion, and such a discretionary determination does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). The text of the INA states that the Attorney General "may" consider an untimely asylum application if the alien demonstrates changed or extraordinary circumstances "to the satisfaction of the Attorney General." 8 U.S.C. 1158(a)(2)(D). Congress's use of the word "may" "expressly recognizes substantial discretion," *Haig* v. *Agee*, 453 U.S. 280, 294 n.26 (1981), and the phrase "to the satisfaction of the Attorney General" demonstrates Congress's expectation that the Attorney General's assessment "entails an exercise of discretion," *Sukwanputra*, 434 F.3d at 635. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988). A challenge to a discretionary determination by the Attorney General is precisely the type of claim over which Congress intended to withhold jurisdiction under 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, H.R. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005) (Section 1252(a)(2)(D) was intended "to permit judicial review over those issues that were historically reviewable on habeas," namely "constitutional and statutory-construction questions, *not discretionary or factual*

questions" (emphasis added)). Because petitioner's claim is a fact-bound challenge to a determination that is in any event discretionary, it does not raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D), and the court of appeals therefore correctly determined that it lacked jurisdiction to consider it.

Third, even if there were jurisdiction, petitioner could not show that the agency erred in refusing to consider his untimely asylum application. If the court of appeals were to consider the timeliness question, it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). Petitioner has not shown that the Board's determination that he failed to adduce facts sufficient to show changed circumstances was unsupported by substantial evidence. As the Board explained in *In re A-M-*, 23 I. & N. Dec. 737, 738 (B.I.A. 2005), which was cited by the Board below (Pet. Supp. App. 9a), the nightclub bombing in Bali in 2002 did not automatically qualify as a "changed circumstance" for any Indonesian native. Although that event was "undoubtedly a tragic event for nearly all Indonesians," an alien seeking to avoid the one-year asylum filing deadline must demonstrate how the bombing "materially affected or advanced his asylum claim." 23 I. & N. Dec. at 738 (citing 8 C.F.R. 1208.4(a)(4)(i)). Petitioner has not made such a showing.

Moreover, even if the bombings constituted changed circumstances, the IJ found that petitioner had not filed his application within a reasonable period of time in light of those circumstances. Pet. Supp. App. 18a. The Board affirmed that finding, *id.* at 10a, and petitioner did not

challenge that finding before the court of appeals. For this reason alone, petitioner cannot demonstrate that he merits an exception to the one-year asylum filing deadline.

Finally, petitioner's asylum claim fails on the merits. As explained below, the Board determined that petitioner failed to show a well-founded fear of persecution in Indonesia based on his religion, and the court of appeals determined that substantial evidence supported that holding. Because there is no reasonable prospect that petitioner could prevail on the merits of his claim, this case would provide a poor vehicle to review the jurisdictional question.

2. Petitioner also contends (Pet. 9-12) that the court of appeals erred in holding that substantial evidence supports the Board's finding that he had not met his burden of proof for asylum. There is no disagreement in the circuits on that issue. Instead, petitioner merely challenges the court of appeals' application of the familiar substantial evidence standard to the facts of his particular case.

Under the substantial evidence standard, petitioner must show that the evidence in the record compels the conclusion that he is eligible for asylum, *Elias-Zacarias*, 502 U.S. at 483-484; see 8 U.S.C. 1252(b)(4)(B) ("administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"). Petitioner did not testify about any instances in which he or his family members in Indonesia actually were harmed based on their religion, and it is well-established that mere harassment does not rise to the level of persecution. A.R. 108-109, 169-170 (petitioner's testimony that he had only feared harassment based on his religion on one occasion, when a stranger

asked him for identification); see *In re A-M-*, 23 I. & N. Dec. at 740. Moreover, petitioner did not demonstrate that there is systematic, pervasive persecution in Indonesia of Christians by individuals or groups the government is unwilling or unable to control. A.R. 65 (petitioner's acknowledgment that the Indonesian government protects against religious discrimination); see, *e.g.*, *In re A-M-*, 23 I. & N. Dec. at 741; see also, *e.g.*, *Lie* v. *Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005) (harm must be inflicted by person or persons that the government is unwilling or unable to control to constitute persecution under the asylum laws). The court of appeals' straightforward application of the substantial evidence standard to the facts of petitioner's case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

JUNE 2009